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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN JOSE DIVISION  
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12 ARTHUR G. MAIONCHI, et al.,  
13 Plaintiffs,  
14 v.  
15 UNION PACIFIC CORPORATION,  
16 Defendant.

Case No.: C 03-0647 JF PVT

**ORDER RE PLAINTIFFS' MOTION  
TO EXCLUDE EXPERT WITNESS  
TESTIMONY; AND  
RECOMMENDATION THAT  
DISTRICT JUDGE FOGEL EXCLUDE  
THE TESTIMONY OF WILLIAM  
GWIRE**

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18 On July 2, 2007, Plaintiffs filed a motion to exclude the testimony of experts Plaintiffs argue  
19 were not timely disclosed.<sup>1</sup> Defendant opposed the motion. Having reviewed the papers submitted  
20 by the parties, the court finds it appropriate to issue this order without oral argument. Based on the  
21 moving and opposition papers filed,

22 IT IS HEREBY ORDERED that Plaintiffs' motion is DENIED with regard to Gary  
23 Hokkanen. Under Rule 37(c)(1), "[a] party that without substantial justification fails to disclose  
24 information required by Rule 26(a) or 26(e)(1) ... is not, unless such failure is harmless, permitted to  
25 use as evidence at trial, at a hearing, or on motion any witness or information not so disclosed."  
26 District courts are permitted particularly wide latitude in imposing sanctions under Rule 37(c)(1).  
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28 <sup>1</sup> The holding of this court is limited to the facts and the particular circumstances  
underlying the present motion.

1 *See Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9<sup>th</sup> Cir. 2001). Exclusion  
 2 of Mr. Hokkanen is thus appropriate only if Defendant was *not* substantially justified in disclosing  
 3 him after the deadline for expert disclosures set in the scheduling order, *and* Plaintiffs were harmed  
 4 by the delay. In the present case, Plaintiffs do not dispute that Mr. Hokkanen is a rebuttal expert.  
 5 The fact that Defendant and its expert were able to see Plaintiffs' expert's report before providing  
 6 Mr. Hokkanen's report did not constitute harm because that is the usual course for rebuttal experts.  
 7 As expert discovery is still open, Plaintiffs may still depose Mr. Hokkanen. Under all the  
 8 circumstances of this case, Defendants' delay in disclosing this expert and his report has not caused  
 9 harm to Plaintiffs that would warrant exclusion of this expert's testimony.<sup>2</sup>

10 IT IS RECOMMENDED, however, that District Judge Fogel exclude from any motion or  
 11 trial the testimony and report of William Gwire. Mr. Gwire, who opines about the reasonableness of  
 12 certain attorneys fees included in Plaintiffs' damage calculations, is not a rebuttal expert because the  
 13 expert he purportedly "rebutts" is not an attorney and does not opine regarding the reasonableness of  
 14 the subject attorneys fees. Defendant has not shown it was substantially justified in waiting 30 days  
 15 after the expert disclosure deadline to disclose an expert who is not a rebuttal expert. Nor has  
 16 Defendant shown that its unjustified delay was harmless. Under the current schedule, which has  
 17 already been extended twice, there is insufficient time for Plaintiffs to retain an expert to rebut Mr.  
 18 Gwire's opinion, for that expert to prepare a report, and for Defendant to depose that expert all  
 19 within the remaining 7 business days before the close of expert discovery.

20 IT IS FURTHER ORDERED that any party may serve and file specific written objections to  
 21 this recommendation within ten (10) working days after being served with a copy. See 28 U.S.C.  
 22 § 636 (b)(1)(C); FED. R. CIV. P. 72(b); CIVIL L.R. 72-3. Failure to file objections within the specified  
 23 time may waive the right to appeal the court's order.

24 Dated: 7/9/07

  
 PATRICIA V. TRUMBULL  
 United States Magistrate Judge

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27 <sup>2</sup> Because the court finds Defendant's delay in disclosing Mr. Hokkanen and his report was  
 28 harmless, the court does not address the issue of substantial justification. While there is a good  
 argument for finding the timing of the disclosure of Mr. Hokkanen to be substantially justified, the  
 timing of the disclosure of his report is questionable.